NOTES OF CASES.

Attorney and Client—Negligence in Examining Title.—In Trimboli *v.* Kinkel, 123 N. E. 295, the Court of Appeals of New York held that the liability of an attorney who negligently passed record title to realty without noting that an executor's deed in chain of title was invalid because he exceeded his authority in exchanging, instead of selling, the land, is not obviated by fact that client probably had good title by adverse possession, where such fact was not mentioned by attorney, nor did he gather evidence to sustain such contention. Such attorney is liable for broker's commissions and title examination fees incurred by client on attempting to resell the property, but not for expected profits of the resale or costs incurred by unreasonably litigating the title question with the prospective purchaser.

The court said: "The executor's deed was plainly invalid. It is negligence to fail to apply the settled rules of law that should be known to all conveyancers. Byrnes *v.* Palmer, 18 App. Div. 1, 45 N. Y. Supp. 479, affirmed on opinion below, 160 N. Y. 699, 55 N. E. 1093; Citizens' Loan & S. Ass'n *v.* Friedley, 123 Ind. 143, 23 N. E. 1075, 7 L. R. A. 669, 18 Am. St. Rep. 320; Watson *v.* Muirhead, 57 Pa. 161, 98 Am. Dec. 213. The defendant knew the facts; for his search went back to the executor's deed and farther. Knowing the facts, he was chargeable with knowledge of their significance. In the absence of clear and cogent evidence of adverse possession, the title was unmarketable. Freedman *v.* Oppenheim, 187 N. Y. 101, 79 N. E. 841, 116 Am. St. Rep. 595. That evidence, if it existed, should have been gathered by the defendant, and preserved in fitting form, before title was accepted. Crocker Point Association *v.* Gouraud, 224 N. Y. 343, 350, 120 N. E. 737. Nothing of the kind was done. Mere lapse of time was insufficient without proof of a hostile holding. Simis *v.* McElroy, 160 N. Y. 156, 54 N. E. 674, 73 Am. St. Rep. 673. The defendant does not acquit himself of negligence by showing that evidence could have been collected. He must show that it was collected. Until that duty had been fulfilled, the title was unmarketable.

"The question remains whether there is any evidence of damage. The defendant has proved that for more than 50 years the plaintiffs and their grantors have been in hostile and unchallenged occupation of the land. The trial judge has held that they have title. We do not need to determine whether their ownership is unclouded by any reasonable doubt. Freedman *v.* Oppenheim, supra; Simis *v.* McElroy, supra; Cambrelleng *v.* Purton, 125 N. Y. 610, 26 N. E. 907; Ferry *v.* Sampson, 112 N. Y. 415, 20 N. E. 387; Day *v.* Kingsland, 57 N. J. Eq. 134, 41 Atl. 99. At least they cannot be said to have made good their allegation that they are not the owners. Woolley

v. Newcombe, 87 N. Y. 605. Their title to an undivided half is independent of the power of sale, and is undoubted. Their title to the other half, if not undoubted, has been supported by evidence which would make out a prima facie case in any contest with an adverse claimant. Koch *v.* Ellwood, 138 App. Div. 584, 123 N. Y. Supp. 502; Fankboner *v.* Corder, 127 Ind. 164, 26 N. E. 766; Arnold *v.* Limeburger, 122 Ga. 72, 79, 49 S. E. 812; Miller *v.* Bumgardner, 109 N. C. 412, 13 S. E. 935; Dessaunier *v.* Murphy, 33 Mo. 184; Gross *v.* Disney, 95 Tenn. 592, 32 N. E. 632. In such circumstances there can be no recovery either of the whole purchase price or of half of it, even if we assume this to be the proper measure of damage where title to the whole or the half has altogether failed. The cloud, if there is any, is shadowy and vague and distant. There has been no attempt to prove the extent to which the presence of such a cloud depreciates the value. Lawall *v.* Groman, 180 Pa. 532, 540, 37 Atl. 98, 57 Am. St. Rep. 662; Whiteman *v.* Hawkins, L. R. 4 C. P. D. 13. The defendant argues that the damages are therefore nominal. But we think this does not follow. The plaintiffs relied on the defendant's assurance that they had a marketable record title. Relying upon that assurance, they made a fruitless contract of resale. They have lost the commissions paid their brokers. They have been forced to reimburse the purchaser for the cost of an examination of the title. If the defendant had been diligent, these expenses would have been saved. The consequences were to be foreseen. A marketable title is one that may be freely made the subject of resale. Resale involves certain expenses as common, if not necessary, incidents. A lawyer takes the risk that those expenses will be lost if he fails to gather in due season the evidences of title. It is a loss within the range of probable contemplation. United States Trust Co. of N. Y. *v.* O'Brien, 143 N. Y. 284, 38 N. E. 266; Dondis *v.* Borden, 230 Mass. 73, 119 N. E. 184; Whitehead Co. *v.* Ryder, 139 Mass. 366, 31 N. E. 736. A different situation would be presented if the plaintiffs had themselves been negligent in failing to supply proof of adverse possession, and had thereby thrown away the opportunity of preserving their contract and minimizing the damage. They are not chargeable with negligence, for the defendant was still their lawyer, and when title was rejected, he made no claim, and supplied no evidence, of title through possession. Crocket Point Ass'n *v.* Gouraud, supra. The fault was still his own. It is true that the plaintiffs have claimed more than they should get. They are not entitled to recover the profits of the resale. Hadley *v.* Baxendale, 9 Exch. 341; Messmore *v.* N. Y. Shot & Lead Co., 40 N. Y. 422; Globe Refining Co. *v.* Landa Cotton Oil Co., 190 U. S. 540, 23 Sup. Ct. 754, 47 L. Ed. 1171. They are still the occupants, and, it may be, the owners of the land, which, for all that the evidence shows, is equally valuable to-day. They are not entitled to recover the costs

of their lawsuit with the purchaser. It was foolish as well as futile to litigate the validity of the exercise of the power of sale. Costs of litigation are not chargeable as damages unless reasonably incurred. Gallo *v.* Brooklyn Savings Bank, 129 App. Div. 698, 700, 114 N. Y. Supp. 78; Hammond *v.* Bussey, 20 Q. B. D. 79; Fitzgerald *v.* Heady, 225 Mass. 75, 77, 113 N. E. 844; Sedgwick on Damages, § 236. Payments made in the reasonable endeavor to discover evidence of adverse possession may stand upon another basis. Den Norske Am. Actiesselskabet *v.* Sun Printing & Pub. Ass'n, 226 N. Y. 1, 122 N. E. 463; Jones *v.* Morgan, 90 N. Y. 4, 11, 12, 43 Am. Rep. 131. But we have said enough to show that there is some evidence of damage."

Contracts—Public Policy—Suppression of Legal Proceedings.—In Eggleston *v.* Pantages, 175 Pac. 34, the Supreme Court of Washington held that an agreement by a corporation stockholder with a majority stockholder that an action to secure the appointment of a receiver for the corporation be dismissed; that the complaint would not be filed with the clerk of the court, and that no information would be given to any one with reference to the commencement of the action was repugnant to public policy.

The court said in part: "It is well settled that agreements against public policy and sound morals will not be enforced by the courts. It is a general rule that all agreements relating to proceedings in courts which may involve anything inconsistent with full and impartial course of justice therein are void, though not open to the actual charge of corruption. This is true, regardless of the good faith or intent of the parties at the time the contract was entered into, or the fact that no evil resulted by or through the contract (Delbridge *v.* Beach, 66 Wash. 416, 119 Pac. 856; 6 R. C. L., p. 751). * * *

"In Paton *v.* Stewart (78 Ill. 481), the action was upon a promissory note the payment of which by the principals thereon had been guaranteed by the defendant. The principals upon the note were indebted to the plaintiffs and others in large sums of money, and on petition of the plaintiffs a rule was issued out of the United States District Court that they should show cause why they should not be adjudicated bankrupt. While this rule was in force, and before any answer had been made thereto, and without the concurrence or consent of any of the other creditors, it was agreed between the plaintiffs and principals on the note that the plaintiffs would not further prosecute the rule in bankruptcy but would abandon that proceeding, and, in consideration of the plaintiffs' agreement in that behalf, the note was executed by the principals, and the defendant guaranteed its payment. It was there held that there could be no recov-